United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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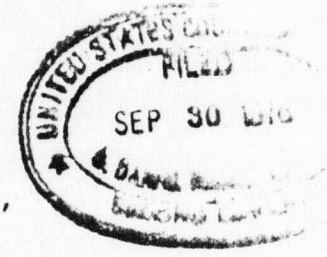
76-702

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7024



MARK RICHARD EDELSTEIN,

Plaintiff-Appellant,

-against-

NEW YORK TELEPHONE COMPANY and
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1104,

Defendant-Appellees.

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

LOCAL 1104

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BRIEF FOR DEFENDANT-APPELLEE

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 1104

STATEMENT OF THE ISSUE

This case presents one issue:

Were the findings of fact made by the trial court pursuant to its granting defendant Union's motion to dismiss "clearly erroneous"?*

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* Edelstein's brief, written without counsel, does not address itself to the issue on appeal. Rather, it repeats allegations as in a complaint, raises some allegations for the first time, and discusses his version of the incidents without regard to the fact that he had a three-day trial in the District Court. The Union submits that there are no errors of law in the record; that this is a case of factual credibility. To assist the Court in understanding Appellant's position, the Union respectfully refers the Court to Edelstein's Pre-Trial Memorandum of Law, prepared by his attorney (Document #28, Index on Appeal).

STATEMENT OF THE CASE

1. Nature of the case.

This is an action brought by the Plaintiff-Appellant, Edelstein, pursuant to Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., alleging acts of religious and sex discrimination by Defendants-Appellees Communications Workers of America, AFL-CIO, Local 1104 ("Union") and the New York Telephone Company ("Telco").

Specifically, the Union was charged with failure to represent Edelstein fairly with respect to his grievances because he is Jewish.

Telco was charged with numerous and repeated instances of harassment by its lower echelon management, refusal to honor an agreement--made when Edelstein was hired--to provide him with permanent shifts, denial of tuition refunds contrary to Company policy, and refusal of transfers and reassignment requests, all because of his religion or his sex. These charges against Telco are not directly relevant to the action against the Union and are referred to in the brief basically as verbal commentary on Edelstein's incredibility as a witness.

2. The Course of Proceedings.

The case was heard before Judge Jack Weinstein in the Eastern District of New York, sitting without a jury, on July 28, 29 and 30, 1975. After Edelstein testified on his own behalf,

he rested his case without further testimonial evidence to corroborate his version of events.

The Union then moved to dismiss the case against it on the ground that the facts did not show that the Union had discriminated against Edelstein because of his religion. (Tr. 349)* Telco also moved to dismiss the case against Telco on the ground that Edelstein had not made out a prima facie case. (Tr. 351) The Court reserved decision on both motions, except that it granted Telco's motion as to tuition refunds, finding that the applications were filed late. (Tr. 350; 352-55)

After the Union presented its direct case and Edelstein declined the opportunity to rebut, (Tr. 513) the Union renewed its motion to dismiss the case against it on the ground that the evidence, as a matter of law, clearly demonstrated that there was no discrimination because of Edelstein's religion. (Tr. 513-515) The motion to dismiss was granted and the District Court read its findings of fact into the record. (Tr. 515; 518-20):

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* "Tr." refers to the transcript dated July 28, 29 & 30, 1975, captioned "Mark Edelstein v. New York Telephone Company and C.W.A. Local 1104."

"Tr.(A)" refers to the transcript dated July 30, 1975, captioned "Mark Edelstein v. New York Telephone Company."

"THE COURT: Motion granted. As a matter of fact, the Court finds that [1] the only grievance that was brought to the Union's attention was the one involving the grandmother incident. [2] And as to that the plaintiff had no case.

The Union went as far as it reasonably could and in good faith it refused to go any further.

[3] With respect to tuition, the Union did give the plaintiff assistance, although it was not obligated to do so. And that assistance was successful.

[4] In the case of providing for a shift that would assist the plaintiff in attending classes, the Union did assist the plaintiff and the Union stood ready to give further assistance which the plaintiff did not avail himself of, including transfer to another plant.

Whatever the facts concerning the Telephone Company are, it does not seem to me there is any reason to find either in fact or in law that the Union did not reasonably support this member.

[5] I was impressed by the credibility of Mr. Myers and Mr. Molinski on these points. And I believe that they did try to help as much as they could.

[6] I believe that there was bad feeling ultimately between Mr. Fee and the plaintiff but it did not interfere with Fee's representation of the plaintiff in his Union functions.

[7] There is no basis for believing that the Union or any of its shop stewards or officials allowed any religious or sex prejudice to affect their decisions or actions in this case."

Telco then presented its case, to which Edelstein offered no rebuttal. (Tr.(A) 119-20) The Court then, without motion, read its findings of fact and law into the record:

"The Court finds that the Defendant did not take any action against the Plaintiff because of any religious or sexual discrimination.

His application for promotion was properly denied on the lack of qualifications and because he had a bad record for attendance.

He was on step five in the Company policy and the Company policy was not to promote somebody in that position.

He was not compelled to resign, he resigned voluntarily.

> Each of his suspensions was for a good cause.
> The evaluations of his work performed were made in good faith.
> He was treated in the same way that a person of another religion or sex would have been treated under the same circumstances.
> There was no discrimination of any kind in this case and, therefore, there is no basis for a judgment in favor of the Plaintiff."

(Tr.(A) 121-22)

The Court directed that the case be entered as a dismissal. (Tr.(A) 123)

Statement of Facts.

Normally, certain stipulated and undisputed facts are available to create a framework for their straightforward presentation in a brief. In this case, however, there are very few facts undisputed other than that Edelstein commenced employment with Telco on or about February 2, 1970, and terminated it on July 30, 1973. Since the credibility of the witnesses and the consistency of their recollection were almost solely determinative of the issue below, it is an insuperable burden to separate, intelligibly, the District Court's findings from an accurate, concise and undisputed statement of facts. The facts are what the District Court found them to be. The Union, therefore, using the findings of fact as an organizational reference point, presents the following facts in the context of and relevant to the allegations against it.

I. Alleged Grievances Presented to the Union

Finding 1. "As a matter of fact, the Court finds that the only grievance that was brought to the Union's attention was the one involving the grandmother incident." (Tr. 518)

Edelstein in fact claimed only a few instances where he presented "grievances." The first claim was when Edelstein complained of rotating shifts to two foreman and a supervisor, not to the Union. (Tr. 47-49)

The second claim was when Edelstein again discussed his complaint about rotating shifts in May or June, 1973, with Michel, a supervisor. Michel allegedly called Edelstein by an ethnic epithet. Edelstein then talked with Fee, his shop steward. Fee allegedly "washed his hands" of Edelstein and threatened him if he would proceed with grievances. (Tr. 61-62)

The third instance was in June or July, 1973, when the Company suspended Edelstein for insubordination, the first of two or three such suspensions. He contacted Fee who, according to Edelstein, again "washed his hands" of him and said he would not handle the grievance. (Tr. 265) (Edelstein claimed that the real but unstated reason for his suspension by Telco was that he intended to present grievances against the Company. (Tr. 317-20))

At a miscellaneous point in the proceedings, Edelstein also made the blanket statement, without further specifics, that Molinski, the chief steward, and other Union officials refused to represent him. (Tr. 262)

However, when Edelstein filed his unfair labor practice charge with the NLRB on January 10, 1974, he only

charged Telco and not the Union. Edelstein first tried to resolve this discrepancy by saying that he tried to file against the Union but was prevented from doing so because it was over six months after the incidents. (Tr. 312) When challenged, he stated with characteristic incomprehensibility that the date on which he filed the charge was not within the six month period because "[a] couple of weeks and it would have been out of the six month period". (Tr. 314-16)

Edelstein apparently is unable to distinguish a gripe from a "grievance" as he presented no documentary evidence of the fact that he presented grievances that were refused by the Union.

The Union version of the facts differed, and its account was credited by the Court. No Union witness testified to any knowledge of any grievance Edelstein may have filed other than that concerning the grandmother incident (see Finding [2] infra). Moreover, Fee denied that he had ever threatened Edelstein about filing grievances (Tr. 377), and Molinski stated that he never refused Edelstein the opportunity to present a grievance. (Tr. 458; 460-61)

Finally, Myers, who, as the Vice-President of the Union, has been processing grievances for twelve years as his primary function (Tr. 472; 493), and who had numerous contacts with Edelstein (Tr. 473), made the flat statement that: "I never heard of any other grievance with Mark Edelstein in my

two-and-a-half years association with him, except one, the one of the three suspensions, of being AWOL [the grandmother incident]." (Tr. 508) It is worth noting that Myers has the authority to take a grievance if an employee is refused permission to file a grievance with a shop steward. (Tr. 511)

In his many contacts with Edelstein, Myers never even heard him complain about insults and harassment (Tr. 473) or religious or sex prejudice. (Tr. 506-07)

In short, the District Court believed the Union witnesses and not Edelstein. (Tr. (A) 120)

II. The Union's Representation in the Grandmother Incident.

Finding 2. "As to the [grandmother incident] the plaintiff had no case. The Union went as far as it reasonably could and in good faith it refused to go any further." (Tr. 518)

Edelstein's version of this incident is that one Wednesday in March, 1973, he requested Thursday off to visit his grandmother. Bove, his foreman, consented. Edelstein called in on Friday morning and was given four more days off. He remembers that he visited his grandmother on three of his five days off. One day he got a haircut and on the other day the hospital told him that he couldn't see her. (Tr. 300-303) She was on the critical list but Edelstein didn't know why. (Tr. 344) He also does not remember being suspended for being AWOL when

he returned. He does not remember filing a grievance, and he does not remember being represented in the grievance procedure by Fee and Molinski. (Tr. 301-303) According to Edelstein, he learned for the first time several months later that the five days had been documented as a suspension. (Tr. 62)

In contrast, all three Union witnesses related a consistent but different version of the incident from that expounded by Edelstein. After coming in late on a Thursday morning, he requested the remainder of the day off to visit his sick grandmother. Michel, the supervisor, consented but denied him further time off. Edelstein responded that he wasn't going to come in on Friday; Michel warned him that he would be suspended for being AWOL if he did not. Ultimately, Edelstein did not come in on Friday and was duly suspended. Edelstein filed a grievance at which Bove, Molinski, Michel and Edelstein were present. The grievance was denied at "step one" of the grievance procedure* and it was referred to Myers, who decided that it had been satisfactorily settled based on a discussion with Edelstein and the opinions of Molinski and Michel. Myers therefore did not take it to "step two." (Tr. 366-70; 423-25 (Fee); Tr. 440-44; 459-60 (Molinski); Tr. 485-86; 489-99 (Myers))

In Fee's words, "it was clear, open and shut case. He was insubordinate and that was it." (Tr. 371) Molinski

* The collective bargaining agreement provided for three "steps" of the grievance procedure before the final "step" of arbitration.

stated: "He had no case at all, period." (Tr. 444) Finally, Myers stated: "he is deliberately flaunting in the face of the Company the fact that he is not going to come to work and they are not going to pay him, he is AWOL and it's legitimate. And based on my experience it is futile to pursue the case." (Tr. 486)

Again, the District Court believed the Union witnesses.

The first two findings alone are sufficient to dispose of the case since it is impossible to prove that religious discrimination was the reason for a breach of the duty to fairly represent when the Court finds that there was no breach in the first instance. Nevertheless, the District Court proceeded to make further findings favorable to the Union.

III. The Union's Support Outside of the Grievance Procedure.

A. Tuition Reimbursement

Finding 3. "With respect to tuition, the Union did give the plaintiff assistance, although it was not obligated to do so. And that assistance was successful. (Tr. 518)

In September, 1970, Edelstein registered for one evening course and two home-study courses. He asserted that he should have received $97.50 in tuition reimbursement upon completion, but did not. (Tr. 22)

The saga of his attempts to receive this money is long. (Edelstein had already been given $1,640.00 in tuition reimbursement under the Telco policy, including $210.00 for a

course that he did not satisfactorily complete. (Tr. 235)) It is not relevant to the claims against the Union, however, since it is not under the Union contract and therefore does not qualify as a grievance. (Tr. 76-77; 511) Notwithstanding, the Union interceded to help Edelstein recover his tuition payments. When Edelstein contacted Myers about it, Myers followed through and helped settle the matter. (Tr. 474-75)

B. Attempts to Get a Permanent Shift

Finding 4. "In the case of providing for a shift that would assist the plaintiff in attending classes, the Union did assist the plaintiff and the Union stood ready to give further assistance which the plaintiff did not avail himself of, including transfer to another plant." (Tr. 518-19)

Edelstein alleged that an unknown interviewer at one of his initial employment interviews made an agreement with him that he would be allowed to work permanent shifts so that he could pursue his college education. (Tr. 8, 92-94) Edelstein felt that this alleged verbal commitment would follow him throughout his career with Telco. (Tr. 101)

He never filed a grievance with respect to breaches of the alleged agreement (Finding [1] above). Edelstein claimed that when he was assigned to a permanent shift it was the result of a compromise with Myers and Michel which provided that Edelstein would not present the grievances he then had against Telco. (Tr. 38; 280) However, Edelstein also stated that the reassignment was the result of a petition which he prepared and circulated. By obtaining the consent of all the framemen, he was able to get the

permanent shift assignment. (Tr. 336)

The facts are otherwise.

Edelstein contacted Myers about this problem. Myers learned from Michel that Edelstein could get a permenent shift if all the framemen signed a petition. (Tr. 476) Fee then wrote up the petition for Edelstein and circulated it himself until all framemen had signed it. (Tr. 373) Moreover, Myers assisted Edelstein numerous other times, discussing job changes, promotions, and the possibility of a transfer to another plant to get a permanent shift. Edelstein declined Myer's offer of help in arranging a transfer. (Tr. 477-81)

Again, the District Court believed the Union witnesses.

C. General Support of Edelstein by Union Representatives.

(a) Molinski and Myers

Finding 5: "Whatever the facts concerning the Telephone Company are, it does not seem to me there is any reason to find either in fact or law that the Union did not reasonably support this member. I was impressed by the credibility of Mr. Myers and Mr. Molinski on these points. And I believe that they did try to help as much as they could." (Tr. 519)

As a starting point, Edelstein charged only Fee with discriminating against him. (Tr. 294) Indeed, Molinski, who has been chief steward for five years, (Tr. 439) and Myers, who has been Union Vice-President for twelve years, both helped Edelstein

with some of his many problems.

At the time when Edelstein was threatened with his first suspension, Molinski advised him how to handle the situation. If Edelstein had followed his advice--work now, grieve later--he could have had a proper grievance without a suspension. (Tr. 444-45)

Of course, Molinski also helped represent Edelstein at the grandmother-incident grievance. (Tr. 440-44)

While Molinski was ready to help and never turned Edelstein away, (Tr. 458) Edelstein simply never grieved to him. (Tr. 460-61)

Myers talked with Edelstein on numerous occasions, (Tr. 472-73) gave him extensive advice, and offered assistance. (Tr. 475-81) Myers' involvement in the grandmother incident is set forth above (See discussion under "Finding 2", supra).

(b) Fee

Finding 6: "I believe that there was bad feeling ultimately between Mr. Fee and the plaintiff, but it did not interfere with Fee's representative of the plaintiff in his Union functions." (Tr. 519)

Fee had been an elected shop steward for over five years. (Tr. 373) He was a participant in an incident in which three or four employees tied Edelstein up with framing wire in the lunchroom at lunchtime. (Tr. 373) But Fee and Edelstein socialized after this incident (Tr. 375) and Fee, in his Union

capacity, helped him on at least two occasions: by representing him in the grandmother incident, supra, and by writing and circulating the petition by which Edelstein was able to get a permanent shift. (Tr. 373)

IV. Religious or Sex Prejudice.

Finding 7: "There is no basis for believing that the Union or any of its shop stewards or officials allowed any religious or sex prejudice to affect their decisions or actions in this case." (Tr. 519)

Edelstein himself greatly restricted the scope of his claim when he stated that only Fee discriminated against him because of his religion (Tr. 294) and that no Union officer, shop steward, or other elected official ever made any malicious reference to his religion. (Tr. 296) Edelstein also made absolutely no allegations of sex discrimination by the Union.

To the extent that Edelstein's charge may have been based on refusal to take grievances because of religious discrimination, the Court found that only one grievance came to the attention of the Union and it was processed. Edelstein's only other reference to religious discrimination was in the nature of ethnic epithets by other employees. (Tr. 17; 20-21; 57-61; 62-66)

However, Fee stated that he never made remarks disparaging Edelstein's religion. (Tr. 379; 431) Molinski stated

that he never heard men call Edelstein "by ethnic names" (Tr. 465) and that Edelstein never complained to him that men had discriminated against him on religious grounds. (Tr. 460-61) Finally, Myers stated that he never received a complaint from Edelstein concerning any Union members using anti-Semitic epithets against him. (Tr. 473)

V. Edelstein's Credibility.

First, it is clear that the District Court found Edelstein to be an incredible witness: "I think there is a flat credibility issue here." (Tr.(A) 120)

Aside from his numerous self-contradictory statements, infra, Edelstein was argumentative and obstreperous on the witness stand. The Court admonished Edelstein nine times, as follows: it directed him to answer the question and not argue with counsel on six occasions; (Tr. 101, 107, 158, 173, 174, 232) not to interrupt the Court, (Tr. 161) not to gesture to his counsel for assistance, (Tr. 239) and, finally, the Court was forced to cut off cross-examination because of Edelstein's intransigence:

> "...I will not cut off the cross-examination because the Court will not put up any further with this witness' interjections. And it's quite clear on the basis of the cross-examination and the direct to the Court that the witness has been upset for some time about the fact that he wasn't given the proper shift in his own estimation. And he is incapable of directing his attention to anything the Court or cross-examining counsel asks him because he comes back to this point over and over again." (Tr. 285-86)

Edelstein also called his credibility into question when he challenged the accuracy of official transcripts five times, three times with respect to EBT's (Tr. 97; 126; 143) and twice with respect to the unemployment hearing transcript. (Tr. 176; 187)

There were also a large number of inconsistencies in addition to those mentioned above.

(1) Although Edelstein first stated that there were only two employment interviews, (Tr. 7) he later described a third interview of January 28, 1970. (Tr. 9)

(2) At one of these interviews, he was told that the only opening was that of lineman, to which he was initially assigned. (Tr. 9) Edelstein, however, has an eye problem which hindered his potential as a lineman. As the result of an operation to remove a tumor from his right eye, he does not have full peripheral vision in that eye. His left eye is 20-60. (Tr. 10) On the application, however, he indicated that his eye problem had been corrected without mentioning his vision impairment. (Tr. 233)

(3) Edelstein felt that the verbal commitment to a permanent assignment from the unknown interviewer would follow him throughout his career with Telco. (Tr. 101) However, in an EBT he had agreed that he signed a statement on the application that he could work weekends or nights depending on Company wishes. Edelstein claimed that he wrote underneath this statement that he was hired on the condition that he could continue his education.

At trial, Edelstein denied that the EBT transcript was correct on this point. (Tr. 97) Nonetheless, the application before the Court did not have such a notation under the statement. Edelstein then explained that he had made two applications. The first, which included the statement, had apparently been lost; the second, of course, did not include the notation. (Tr. 104) He initially denied that the application without the notation was the one that had been acted on, but then took the position that it was not the original application. (Tr. 105)

(4) At trial, Edelstein testified that on October 1, 1970, he asked for Rosh Hashonah off. This testimony, however, does not exactly square with that which he gave in an EBT, where he stated that he had asked for days off only in order to attend family gatherings around the holiday periods of Hanukkah and the Jewish New Year. (Tr. 143-47) (He also stated: "I am not that religious, but I don't believe [Haunkkah] always comes on the same date and it doesn't come on the 25th of December." (Tr. 144))

(5) In April, 1973, Edelstein applied for the jobs of special sales representative, garage mechanic and others. (Tr. 49-51) However, he was on Step 5 of the Absence Control Program at this time, one step from dismissal. He knew that he could not be considered for promotion while on Steps 4 or 5. (Tr. 331-32)

(6) While Edelstein testified at trial that he could not remember whether he ever filed a charge with the U.S. Labor Department's Wage and Hour Division, (Tr. 282) he testified

in an EBT that he had not done so. (Tr. 288-90)

(7) Although Edelstein asserts that he was denied the opportunity to be a business representative because of his sex, when he filed his charge with the EEOC he did not mention this claim. (Tr. 115-121; 130) When that fact was pointed out, Edelstein claimed that the entire EEOC file, which he had introduced into evidence, (Tr. 83) was incomplete because it did not contain such a charge. (Tr. 130) Moments later he claimed that he had been advised by EEOC not to include a charge concerning the business representative position since it was a lower-paying job. Edelstein maintained that he did so anyway, but in a missing part of the file. (Tr. 139-40)

(8) Edelstein resigned on July 30, 1973. At trial he alleged that he had been faced with the choice of a permanent latrine duty assignment or resignation. However, in letters dated July 31 and August 4, 1973, to Mr. Carmichael of Telco, he did not mention either the latrine duty assignment or any allegations of religious discrimination. (Tr. 175)

(9) On September 10, 1974, Edelstein filed a charge with the National Labor Relations Board against Telco. Although he claimed that he told an agent of the Board that he felt he was being set up to be fired, this charge did not appear in the official charge. (Tr. 191) There was also no mention of it in the appeal letter he wrote when the NLRB found against him. (Tr. 195)

(10) Sometime after he had stopped working for Telco he filed a claim for unemployment insurance and attended four hearings. Edelstein said he did not have an opportunity to explain why he left Telco, the only issue involved, because he did not have an attorney and was rushed through the hearing process. He nonetheless admitted that he testified and was given an opportunity for a closing statement. At no time did he mention then or at any other time the threatened permanent-latrine-duty assignment. (Tr. 176-77) Edelstein also stated that the unemployment hearing, although more recent than the facts at issue during the trial, was "quite a while ago" and that "my recollection is not clear." (Tr. 177)

ARGUMENT

POINT I

THE FINDINGS OF FACT MADE BY THE TRIAL COURT AFTER GRANTING THE UNION'S MOTION TO DISMISS ARE NOT ERRONEOUS, MUCH LESS CLEARLY ERRONEOUS: THE JUDGMENT OF DISMISSAL SHOULD, THEREFORE, BE AFFIRMED.

The motion to dismiss on the law and facts granted at the close of the case as against the Union was made under Rule 41(b), and the District Court made findings of fact pursuant to Rule 52(b). Accordingly, this Court must not overturn the judgment of dismissal unless it finds the findings to be "clearly erroneous", and must affirm the judgment if there is substantial evidence to sustain it. FRCP 52(b). In addition, the appellee is entitled to have the evidence viewed in the light most favorable to it. Although we do not wish in this case to dim the light to which we are entitled, we respectfully submit there is substantial evidence to support the findings even without such favorable view or other presumption.

A. The "clearly-erroneous" rule requires at the very least a strong presumption in favor of the findings of fact.

"The findings of fact, which the trial judge must make where he sustains defendant's Rule 41(b) motion and

renders judgment on the merits, are, pursuant to Rule 52(b), not to be set aside on appeal unless clearly erroneous." Moore's Federal Practice, ¶41.13[4] at 1160.

The Supreme Court has defined the standard as follows:

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, (1948).

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123 (1969). See, e.g., Iravani Mottaghi v. Barkey Importing Co. 244 F. 2d 238, 248 (2d Cir. 1957), cert. denied, 354 U.S. 939 (1957).

Some Circuits have further defined the standard. The Seventh, Eighth and Ninth Circuits hold that the court must view the evidence and the inferences to be deduced therefrom in the light which is most favorable to the party who prevailed below. If, when so viewed, there is substantial evidence to sustain the judgment, it cannot be reversed.

E.g., Indiana State Employees Association, Inc. v. Negley, 501 F.2d 1239, 1242 (7th Cir. 1974); United States v. Disney, 413 F.2d 783, 787 n.2 (9th Cir. 1969); Nathan Construction Co. v. Fenestra, Inc., 409 F.2d 134, 137-38 (8th Cir. 1969).

The Fourth and D.C. Circuits hold that the findings of fact are presumptively correct. E.g., Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973); Gibbs v. Norfolk Southern Ry., 474 F.2d 1341, 17 F.R. Serv. 2d 176 (4th Cir. 1973).

The First and Fifth Circuits hold that there is a heavy burden on the party attacking the findings. E.g., Griffin v. Missouri Pacific R.R. Co., 413 F.2d 9, 13 (5th Cir. 1969); Obolensky v. Saldana Schmier, 409 F.2d 52, 54 (1st Cir. 1969). In Western Cottonoil Co. v. Hodges, 218 F.2d 158 (5th Cir. 1954), the court explained that findings are "clearly erroneous" (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which, if credible, would be substantial, the force and effect of the testimony considered as a whole convinces one that the finding is so

against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Although this Circuit has not attempted such further definition, it is clear from all of the reported cases that a strong presumption exists in favor of the trial court's findings of fact. Moore's, ¶52.03[1] at 2627-28.

Of course, as is particularly appropriate in this case, the reputation and standing of the trial judge for qualities that make judging a master's art cannot and should not be ignored. Moore's, ¶52.03[1] at 2627.

B. The clearly-erroneous rule should be applied more rigorously against the appellant since his burden of proof was not simply that the Union's actions were incorrect but that they were arbitrary or in bad faith and motivated by intentional, invidious discrimination.

Edelstein's claim that the Union violated Title VII is predicated on the Union's failure to fairly represent him because of his religion. The Union's duty to fairly represent a member is defined in Vaca v. Sipes, 386 U.S. 171 (1967). "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of

the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. Therefore, Edelstein had to establish not only that the union conduct constituted a breach of the duty but also that it was based on intentional religious or sex discrimination. See, e.g., Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C. Cir. 1973). In Jackson v. Trans World Airlines, 457 F.2d 202 (2d Cir. 1972), this Circuit stated that: "[s]omething akin to factual malice is necessary to establish a breach of the duty of fair representation." (457 F.2d at 204)

The burden was thus a difficult one to sustain. The Union submits that the clearly erroneous standard should, therefore, be applied even more rigorously in this case. In a similar situation, the D.C. Circuit held that the "clearly erroneous" rule must be applied with the degree of burden of proof in mind, suggesting that a particular finding might be justified, and therefore not "clearly erroneous" where the burden of proof was mere preponderance, but "clearly erroneous" when the burden required "clear, unequivocal and convincing" testimony. Soccodato v. Dulles, 21 F.R. Serv. 52a.42, Case 1 (D.C. Cir. 1955).

Although the Second Circuit has not addressed this specific issue, the logic is compelling and should be applied to this case.

C. There is substantial evidence to support the findings of fact.

Without considering the question of credibility, there is substantial evidence to support each of the seven findings of the District Court as indicated in the Statement of Facts. Even if this were not the case, it should not change the result. Since the District Court's low regard for the witness was entirely justified, and since the only evidence against the Union was Edelstein's uncorroborated testimony, there was no alternative to finding for the Union. That the District Court entered the case as a dismissal on motion from the bench rather than rendering a verdict for the Union after trial supports this contention.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7204

Mark Richard Edelstein, *Plaintiff* - Appellant

against

N.Y. Telephone Co., and Communications Workers of America, AFL-CIO, Local 1104

Defendant - Appellees

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ***ss.:***

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 41 West 72nd Street New York, New York 10023

That on September 30, ***19*** 76 ***deponent served the annexed***

BRIEF FOR DEFENDANT-APPELLEE, Communications Workers of America, AFL-CIO Local 1104

on Mark Richard Edelstein, Plaintiff-Appellant

in this action at 1862 Leonard Lane, Merrick, New York 11666

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

September 30, 1976

Melody Newrock

The name signed must be printed beneath

Melody Newrock

2 Copies Received

Date September 30, 1976

Firm Saul Scheier, Esq.

By Anne Manton
for Mr. Scheier